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ALEXANDER L. STEVENS  
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No. 83-6125

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

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ROGER DALE STAFFORD,

Petitioner,

vs.

THE STATE OF OKLAHOMA

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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RESPONDENT'S BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI

---

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February, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Whether a hearing in state court is constitutionally required whenever a criminal defendant alleges that he did not receive the effective assistance of counsel.

2. Whether allowing a wife to testify as to conversations with her husband which occurred in the presence of a third party violates the Fifth Amendment to the United States Constitution.

TABLE OF CONTENTS

Page

Questions Presented . . . . .	1
Table of Authorities . . . . .	iii
Opinion Below . . . . .	1
Jurisdiction . . . . .	1
Constitutional and Statutory Provisions Involved . . .	1
Statement of the Case . . . . .	4
Reasons Why Writ Should be Denied . . . . .	5
PROPOSITION I	

THE TRIAL TRANSCRIPT REVEALS THAT THE PETI- TIONER WAS EFFECTIVELY REPRESENTED AT TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMEND- MENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE. . . . .	5
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PROPOSITION II

TESTIMONY OF THE PETITIONER'S WIFE CONCERN- ING CONVERSATIONS WITH THE PETITIONER IN THE PRESENCE OF A THIRD PARTY DID NOT VIOLATE THE PETITIONER'S PRIVILEGE AGAINST SELF- INCRIMINATION UNDER THE FIFTH AMENDMENT. . . . .	9
Conclusion . . . . .	9

# TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
Beck v. Alabama, 447 U.S. 625 (1980) . . . . .	7
Beckham v. Wainwright, 639 F.2d 262 (11th Cir. 1981) . . . . .	6, 8
Chambers v. Mississippi, 410 U.S. 284 (1973) . . . . .	9
Cuyler v. Sullivan, 446 U.S. 335 (1980) . . . . .	8
Dutton v. Evans, 400 U.S. 74 (1970) . . . . .	9
Eddings v. Oklahoma, 455 U.S. 104 (1982) . . . . .	8
Holloway v. Arkansas, 435 U.S. 475 (1978) . . . . .	5
Jackson v. Denno. 378 U.S. 368 (1964) . . . . .	5
Lockett v. Ohio, 438 U.S. 586 (1978) . . . . .	8
McMann v. Richardson, 397 U.S. 759 (1970) . . . . .	6, 8
People v. Corona, 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978) . . . . .	8
Stafford v. State, 669 P.2d 285 (Okl.Cr. 1983) . . . . .	6, 7, 8
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) . . . . .	6, 7, 8
Tollet v. Henderson, 411 U.S. 258 (1973) . . . . .	8
Trammel v. United States, 445 U.S. 40 (1980) . . . . .	9
United States v. Atkinson, 297 U.S. 157 (1936) . . . . .	7
Watkins v. Sowders, 449 U.S. 341 (1981) . . . . .	6
Wood v. Georgia, 450 U.S. 261 (1981) . . . . .	7

## Statutes Cited

21 O.S.Supp.1976, § 701.7 . . . . .	2, 4
21 O.S.Supp.1976, § 701.9 . . . . .	2
21 O.S.Supp.1976, § 701.10 . . . . .	2
21 O.S.Supp.1976, § 701.11 . . . . .	2
21 O.S.Supp.1976, § 701.12 . . . . .	3
21 O.S.Supp.1976, § 701.13 . . . . .	3

Constitutional Provisions

U.S. Const., Fifth Amendment . . . . .	1
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Other Authorities Cited

28 U.S.C. § 1257(3) . . . . .	1
Rule 34.1 <u>Rules of the Supreme Court</u> . . . . .	7
Stern & Gressman, <u>Supreme Court Practice</u> , § 7.27 (5th ed. 1978), p. 460 . . . . .	7

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RESPONDENT'S BRIEF IN OPPOSITION  
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The respondent, State of Oklahoma, by and through Michael C. Turpen, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Criminal Appeals of the State of Oklahoma entered on September 7, 1983, and to which rehearing was denied on October 6, 1983.

OPINION BELOW

The Opinion of the Oklahoma Court of Criminal Appeals is reported at 669 P.2d 285 (Okla. Cr. 1983).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless

on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 21 O.S.Supp.1976, § 701.7 provided in part:

"A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof."

B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, first degree burglary or first degree arson.

Title 21 O.S.Supp.1976, § 701.9 provided in part:

"A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life."

Title 21 O.S.Supp.1976, § 701.10 provided as follows:

"Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death."

Title 21 O.S.Supp.1976, § 701.11 provided as follows:

"In the sentencing proceeding, the statutory instructions as determined by the trial judge



to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury if its verdict be a unanimous recommendation of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life."

Title 21 O.S.Supp.1976, § 701.12 provided as follows:

"Aggravating circumstances shall be:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony; or
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."

Title 21 O.S.Supp.1976, § 701.13 provided as follows:

"A. Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Oklahoma Court of Criminal Appeals. The clerk of the trial court, within ten (10) days after receiving the transcript, shall transmit the entire record and transcript to the Oklahoma Court of Criminal Appeals together with a notice prepared by a clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and



supplied by the Oklahoma Court of Criminal Appeals.

B. The Oklahoma Court of Criminal Appeals shall consider the punishment as well as any errors enumerated by way of appeal.

C. With regard to the sentence, the court shall determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

2. Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in this act; and

3. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

E. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

1. Affirm the sentence of death; or

2. Set the sentence aside and remand the case for modification of the sentence to imprisonment for life.

F. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

#### STATEMENT OF THE CASE

The Petitioner, Roger Dale Stafford, Sr. (hereinafter referred to as the "Petitioner"), was convicted of 3 counts of Murder in the First Degree in the District Court of McClain County in violation of 21 O.S.Supp.1976, § 701.7. The Petitioner was convicted by a jury which then heard evidence in the second stage of the trial and found the existence of 4 aggravating circumstances,<sup>1</sup>

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<sup>1</sup> The jury found that (1) the Petitioner knowingly created a great risk of death to more than one person (2) the murders were especially heinous, atrocious or cruel (3) the murders were committed for the purpose of avoiding or preventing lawful arrest or prosecution (4) there exists a probability that the Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, § 701.12 (2) (4) (5) (7).

and sentenced the Petitioner to death.

The facts of the case are set forth in detail in the reported opinion of the Oklahoma Court of Criminal Appeals referred to previously. Briefly stated, the Petitioner, his wife Verna, and his brother Harold stopped their car on an interstate highway south of Oklahoma City and feigned mechanical problems in order to cause a motorist to stop so they could rob him. Verna Stafford was stationed by the car and the Petitioner and Harold hid behind the car. The victims, an Air Force sergeant named Melvin Lorenz, who was accompanied by his wife and 11 year-old son, and who was enroute to his mother's funeral in North Dakota, stopped to assist the Petitioner's wife, who had flagged them down while standing next to the car which had a raised hood. The Petitioner and Harold robbed Sergeant Lorenz and then the Petitioner murdered him, his wife and their 11 year-old son. The victims' bodies were then dumped by the side of the Interstate.

The Petitioner has another Petition pending before this Court in Case No. 83-5636, wherein he has received the death sentence in an unrelated case in which he was convicted of murdering 6 employees of a steakhouse in Oklahoma City.

#### REASONS WHY THE WRIT SHOULD BE DENIED

##### PROPOSITION I

THE TRIAL TRANSCRIPT REVEALS THAT THE PETITIONER WAS EFFECTIVELY REPRESENTED AT TRIAL AND THEREFORE WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND WAS NOT ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE.

The Petitioner contends that he should have received an evidentiary hearing in state court on the issue of whether he received the effective assistance of counsel in this case.

No authority has been cited to support the contention that a state is required to conduct an evidentiary hearing to consider a claim of ineffective representation by trial counsel. The Supreme Court has mandated hearings in state courts on certain issues in criminal proceedings. Jackson v. Denno, 378 U.S. 368 (1964) (hearing required to determine voluntariness of confession); Holloway v. Arkansas, 435 U.S. 475, 487 (1978) (trial

court under duty to examine defense attorney's contention of existence of conflict of interest).

However, on other issues the Court has reviewed the facts of a particular case to determine whether constitutional error was committed by failing to hold a hearing at the defendants' request. In Watkins v. Sowders, 449 U.S. 341 (1981) the Court refused to adopt a per se rule requiring a hearing outside the presence of the jury to determine the admissibility of eyewitness identification testimony. In McMann v. Richardson, 397 U.S. 759, 771 (1970) the Court held that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his federal petition for writ of habeas corpus.

In the present case the trial record itself reveals that the Petitioner was effectively represented at trial. The Oklahoma Court of Criminal Appeals noted that "[t]hroughout the trial [the defense attorney] made objections, argued points of law, vigorously cross-examined witnesses and attempted to establish an alibi with witnesses for the defense." Stafford v. State, 669 P.2d 285, 296 (Okla.Cr. 1983).

The trial record discloses that the defense attorney cross-examined all but 3 of the 33 witnesses called by the State in its case in chief and all but 1 of the 9 rebuttal witnesses called by the State. The defense called 9 witnesses (including the Petitioner) to attempt to establish alibi. The defense attorney questioned prospective jurors on voir dire and gave an opening and closing statement in the case in chief.

While the defense attorney did give only a 3 page closing argument at the close of the second stage, in view of the nature of the evidence, this may have been the most effective tactic, particularly at the close of a trial which lasted 11 days and which resulted in a 1622 page trial transcript. A defense attorney's actions should be viewed in the context of his overall performance rather than dissection of his advocacy and second guessing of each individual action. Stanley v. Zant, 697 F.2d 955, 962 (11th Cir. 1983). Beckham v. Wainwright, 639 F.2d 262,

With regard to other specific allegations, the Petitioner contends that the defense attorney was incompetent because he failed to attack the form of the notice of aggravating circumstances for vagueness (Petition, p. 8). However, this issue was not raised on appeal even by the appellate counsel who attacked the trial counsel's competency. The appellate counsel also failed to list this as a reason in his brief why the trial attorney was ineffective (Brief of Appellant, pp. 57-71). Furthermore, the Petitioner's counsel in the present Petition has not presented this contention as a separate issue.

Since this issue has never been presented to any state court, this Court may consider it only if it constitutes "plain error". Rule 34.1 Rules of the Supreme Court. The State contends that this issue does not fall within that doctrine. Wood v. Georgia, 450 U.S. 261 (1981); Stern & Gressman, Supreme Court Practice, § 6.27 (5th ed. 1978), p. 460. Cf. Beck v. Alabama, 447 U.S. 625 (1980); United States v. Atkinson, 297 U.S. 157, 160 (1936).

The Petitioner also claims that the trial attorney was incompetent because he did not fully comply with Oklahoma's statutory requirements for seeking a change of venue (Petition, p. 9). However, the Oklahoma Court of Criminal Appeals explicitly stated that they considered the issue on the merits and that the contention had no basis. Stafford v. State, supra, 669 P.2d at 290, n. 1, 295-296. The Petitioner has therefore failed to demonstrate that ineffectiveness caused "actual and substantial prejudice." Stanley v. Zant, supra, 697 F.2d at 958.

The Petitioner also contends that trial counsel should have objected to the trial court's instructions regarding mitigating circumstances. However, in addition to setting forth possible minimum mitigating circumstances the trial court specifically instructed the jury:

"... You shall consider any or all of these minimum mitigating circumstances which you find apply to the facts and circumstances of this case. You are not limited in your consideration to these minimum mitigating circumstances. You may consider any additional mitigating circumstances, if any, you find from the evidence in this case. What are and

what are not additional mitigating circumstances is for you the jury to determine." (O.R. 105; Tr. 1606).

Therefore, the instructions were not violative of this Court's mandates in Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978).

The Petitioner next complains of remarks of trial counsel concerning comments he made in the second stage of the trial (Petition, pp. 10-11). A reading of the transcript (Tr. 1611-1613), however, discloses that the trial attorney was merely informing in the Court that he should be permitted to have the opportunity to present evidence or rest prior to the closing argument of the prosecutor. These remarks occurred outside the presence of the jury and the Petitioner cannot contend that he was prejudiced by such. The fact that no evidence was presented in mitigating does not establish incompetence on the part of trial counsel. Stanley v. Zant, supra, 697 F.2d at 958-961.

The Petitioner also contends that the fact that the trial counsel had obtained an interest in publication rights relating to the Petitioner's case. The Oklahoma Court of Criminal Appeals pointed out that the present case was distinguishable from that in People v. Corona, 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978) since there has been no showing that the existence of such a contract had adverse effects on the Petitioner's legal representation. Stafford v. State, supra, 669 P.2d at 297-298. Furthermore, the Petitioner has failed to demonstrate that an actual conflict of interest existed. Cuyler v. Sullivan, 446 U.S. 335 (1980).

An independent review of the record reveals that the trial counsel performed "'within the range of competence demanded of attorneys in criminal cases'." Tollet v. Henderson, 411 U.S. 258, 266 (1973); McMann v. Richardson, supra, 397 U.S. at 771; Beckham v. Wainwright, supra, 639 F.2d at 267.



## PROPOSITION II

TESTIMONY OF THE PETITIONER'S WIFE CONCERNING CONVERSATIONS WITH THE PETITIONER IN THE PRESENCE OF A THIRD PARTY DID NOT VIOLATE THE PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AMENDMENT.

The Petitioner complains that the admission into evidence of testimony of the Petitioner's wife concerning conversations with the Petitioner which occurred in the presence of the Petitioner's brother Harold.

This contention was not presented to the Oklahoma Court of Criminal Appeals as an alleged violation of the Petitioner's privilege against self-incrimination. Instead, the Petitioner's appellate counsel contended that the testimony violated Oklahoma statutory provisions concerning husband and wife privileges. Brief of Appellant, pp. 45-50. Therefore, that issue is not properly before this Court. See p.f., supra.

The Petitioner concedes that his contention is contra to this Court's holding in Trammel v. United States, 445 U.S. 40 (1980), but urges the Court to "review its ruling in light of his argument dealing with his Fifth Amendment argument" (Petition, p. 16).

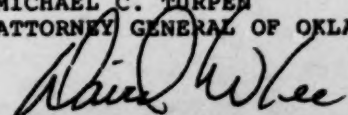
The State contends that the Trammel ruling should be adhered to and notes that that case dealt strictly with the spousal privilege in federal courts. However, it seems to be apparent that since the Supreme Court has approved this evidentiary rule for federal courts that the state courts violate no constitutional rights by adopting the same. Cf. Chambers v. Mississippi, 410 U.S. 284 (1973); Dutton v. Evans, 400 U.S. 74 (1970).

## CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

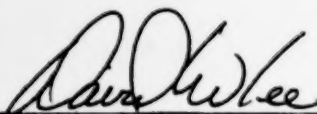
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CERTIFICATE OF MAILING

On this 6<sup>th</sup> day of February, 1984, a true and correct copy of the foregoing was mailed, postage prepaid, to:

Charles B. Grethen  
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113 1/2 N. 2nd  
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DAVID W. LEE

:bks